1988

State of Utah v. David J. Hunt : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

DOCKET NO. 880386

STATE OF UTAH,	:	
Plaintiff-Respondent,	:	Case No. 880386-CA
v.	:	
DAVID J. HUNT,	:	Category No. 2
Defendant-Appellant.	:	

BRIEF OF RESPONDENT

APPEAL FROM A CONVICTION OF POSSESSION OF A CONTROLLED SUBSTANCE WITH INTENT TO DISTRIBUTE FOR VALUE, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. § 58-37-8 (1986) IN THE SECOND JUDICIAL DISTRICT COURT, IN AND FOR WEBER COUNTY, STATE OF UTAH, THE HONORABLE DAVID E. ROTH, JUDGE, PRESIDING.

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BRIEF OF RESPONDENT

JURISDICTION AND NATURE OF PROCEEDINGS

This appeal is from a conviction of Possession of a Controlled Substance with the Intent to Distribute for Value, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1986), in the Second Judicial District Court, in and for Weber County. This Court has jurisdiction to hear the appeal pursuant to Utah Code Ann. § 78-2a-3(2)(f) (Supp. 1988).

STATEMENT OF ISSUES PRESENTED ON APPEAL

1. Whether the County Attorney's authorization of an application for an wiretap need not be a signed writing.

2. Whether the Deputy County Attorney was duly authorized to apply for a wiretap extension order where the application stated he was "duly authorized?"

3. Whether Utah Code Ann. §§ 77-23a-7 and 77-23a-10(10) (1982) mandate suppression of evidence obtained as a result of execution of a search warrant based upon information obtained from a telecommunicator intercept order, which order contained a technical defect?

2. Whether defendant was denied his right to effective assistance of counsel in violation of the Sixth Amendment to the United States Constitution and section 12, article I of the Constitution of the State of Utah.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES

Utah Code Ann. § 77-23a-7. Evidence - Exclusionary Rule.

When any wire, electronic, or oral communication has been intercepted, no part of the contents of the communication and no evidence derived from it may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision of the state, if the disclosure of that information would be in violation of this chapter.

Utah Code Ann. § 77-23a-8. Court order to authorize or approve interception -- Procedure.

The attorney general of the state, or any assistant attorney general specifically designated by the attorney general or any county attorney or any deputy county attorney specially designated by the county attorney, may authorize an application to a judge of competent jurisdiction.

Utah Code Ann. § 77-23a-10.

(1) Each application for an order authorizing or approving the interception of a wire, electronic, or oral communication shall be made in writing upon oath or affirmation to a judge of competent jurisdiction, and shall state the applicant's authority to make the application. . . .

Utah Code Ann. § 77-23a-10(5)a.

(5)(a) An order entered under this chapter may not authorize or approve the interception of any wire, electronic, or oral communication for any period longer than is

necessary to achieve the objective of the authorization, nor in any event longer than 30 days. The 30 day period begins on the day the investigative or law enforcement officer first begins to conduct an interception under the order, or ten days after the order is entered, whichever is earlier.

Utah Code Ann. § 77-23-10(5)b.

(b) Extensions of an order may be granted, but only upon application for an extension made under Subsection (1), and if the court makes the findings required by Subsection (2). The period of extension may be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, but in not event for longer than 30 days.

Utah Code Ann. § 77-23-10(10)(a).

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, Utah, or a political subdivision, may move to suppress the contents of any intercepted wire, electronic, or oral communication, or evidence derived from any of them, on the grounds that:

(i) the communication was unlawfully intercepted,
(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
(iii) the interception was not made in conformity with the order of authorization or approval.

STATEMENT OF THE CASE

Defendant, David J. Hunt, was charged with Possession of a Controlled Substance with Intent to Distribute for Value, a second degree felony, in violation of Utah Code Ann. § 58-37-8 (1986). Defendant was convicted as charged after a bench trial held February 19-20, 1987, in the Second Judicial District Court, in and for Weber County, the Honorable David E. Roth, Judge,

presiding. Defendant was sentenced by Judge Roth on March 16, 1987, to a term of not less than one nor more than fifteen years in the Utah State Prison.

STATEMENT OF THE FACTS

On May 23, 1986, Don Hughes, the Weber County Attorney, filed an application for an order to intercept wire communications of defendant's residence. (See Br. of App. Addendum pages 11-14.)[1] Attached to and incorporated into the application was an affidavit signed by Glen M. Warner, Sergeant of the Ogden City Police Department Narcotics Division, under oath and affirmation to John F. Wahlquist, a judge in the Second Judicial District. (See Brief of App. Addendum pages 15-42.) The affidavit named defendant as the main person involved in a drug organization that purchases and transports cocaine to various other suppliers along the Wasatch Front. (See Brief of App. Addendum page 27.)

Judge Wahlquist signed an Ex-parte Order authorizing the interception of defendant's write communications from May 29, 1986 to June 28, 1986. (See Br. of App. Addendum pages 43-48; T. 36). At that time, the absence of Mr. Hughes' signature on the application was not noticed, though the unsigned writing was part of the file with Mr. Hughes' name repeated throughout. (See Br. of App. Addendum pages 11-14; T. 36.)

On June 27, 1986, an application for an Ex-parte Order authorizing the Extension of the intercept was made by William F.

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[1] Due to the volume of relevant documents, respondent will refer to the Addendum of the Brief of Appellant rather than duplicating the documents.

Daines, Deputy Weber County Attorney. (See Br. of App. Addendum pages 51-54.) Pursuant to Utah Code Ann. § 77-23a-8 (1980), the application identified Mr. Daines as being "duly authorized" to make the application. (See Brief of App. Addendum page 51.) Attached to an incorporated into the application was an affidavit submitted by Sergeant Warner setting forth the results of the first intercept. (See Br. of App. Addendum pages 55-59.) Defendant, however, had left town for much of June, thereby negating much of the intercept period allowed in the first order. (See Br. of App. Addendum page 56; T. 42.) Consequently, Judge Wahlquist approved the extension of the intercept between June 28, 1986 and July 27, 1986. (See Br. of App. Addendum page 62.)

On July 26, 1986, Mr. Daines applied for another extension of the wiretap. (See Br. of App. Addendum page 69.) During preparation to apply for this final extension, it was learned that Mr. Hughes had failed to sign the original application for an intercept (T. 40). Thereafter, Mr. Hughes filed a Nunc Pro Tunc Order remedying the clerical defect. (See Br. of App. Addendum pages 49-50; T. 46.) The Nunc Pro Tunc Order corrected the oversight before the search of defendant's house and before his arrest (T. 37). Judge Wahlquist granted the extension of the intercept for seven more days operating from July 27, 1986 to August 3, 1986. (See Br. of App. Addendum page 79.) The interception of defendant's wire communications ceased on August 3, 1986, in compliance with the Intercept Order (T. 32, 45). A pen register, however, continued to operate on defendant's phone (T. 63).

Based upon information accumulated by three Intercept Orders on defendant's phone, it appeared that a large drug transaction was about to occur between defendant a woman who lived in Vista, California. (See Br. of App. Addendum page 92.) On August 5, 1986, after calling the Vista number, defendant left suddenly for California (T. 64). Detectives Shorten and Cottom, who were on surveillance at the Vista residence, informed the Utah police that defendant arrived at the residence on August 6, 1986 (T. 65, 144, 165).

During defendant's stay in California, Brent West, Circuit Court Judge, received an affidavit in support of a search warrant based upon information obtained from the intercept on defendant's phone. (See Br. of App. Addendum pages 87, 91-94.) Finding probable cause to believe that defendant was involved in criminal activity, Judge West issued a search warrant for the defendant's home and automobiles. (See Br. of App. Addendum pages 86-94; T. 27.)

On the night of August 8, 1986, defendant began driving back to Utah (T. 149-50, 170). Defendant was followed by four police cars and one helicopter (T. 234). Defendant arrived at his home in Utah on the morning of August 9, 1986 (T. 68). On or about August 9, 1986, the search warrant was executed on defendant's house and vehicles. (See Br. of App. Addendum pages 88-89.) Thirty-four items of personal property were seized pursuant to the warrant including a pound of cocaine, set scales, scale weights, and a coke screen used to measure cocaine. (See Br. of App. Addendum pages 88-89.) Defendant was arrested and

charged with Possession of Cocaine with Intent to Distribute for Value (T. 255).

On February 17, 1987, Mr. Don Sharp, counsel for defendant, filed a motion to suppress all evidence seized as a result of the search of defendant's home and vehicles (R. 39-40). The motion to suppress primarily challenged the sufficiency of the probable cause statements in support of the search warrant (R. 40).

On February 19, 1987, trial was held before the Honorable David E. Roth, Judge of the Second Judicial District Court, sitting without a jury (R. 256). During trial, Mr. Sharp objected to the admission of any evidence obtained as a result of the Intercept Orders because Mr. Hughes had not signed the original order (T. 37). He also raised the issue of the validity of the Nunc Pro Tunc Order (T. 37). Judge Roth denied defendant's motion finding that the failure to timely sign the Application was not fatal to the warrant (T. 41).

Defendant was convicted of possession of a controlled substance with the Intent to Distribute for Value (T. 293). Defendant was sentenced to serve a term in the Utah State Prison of not less than one nor more than fifteen years (T. 156). On May 29, 1988, Don Hughes filed an affidavit establishing his authorization of the application for the intercept and his special designation of Mr. William Daines to authorize the extensions (R. 251-52). Defendant's direct appeal was dismissed on June 1, 1987 for failure to prosecute (R. 163). After a Habeas Corpus action in the Third Judicial District Court, the

matter was remitted back to Judge Roth for re-sentencing to allow defendant to pursue his right to appeal (R. 167-71). Defendant's Notice of Appeal was filed June 6, 1988, and he was released from the Utah State Prison following Judge Roth's approval of a Certificate of Probable Cause (R. 231, 233).

SUMMARY OF THE ARGUMENT

Utah Code Ann. § 77-23a-8 (1982) does not require the County Attorney's signature to authorize or specially designate a deputy county attorney to authorize an application for a wiretap. In any event, the wiretap application the Nunc Pro Tunc Order, and the County Attorney's Affidavit are establish that the wiretap application was in fact authorized by the County Attorney.

The application for extension of the wiretap order specifically stated that the Deputy County Attorney was "duly authorized" to file the pleading.

The Court properly denied defendant's motion to suppress all evidence obtained pursuant to the wiretap where the wiretap orders were properly authorized.

ARGUMENT

POINT I

THE COUNTY ATTORNEY'S AUTHORIZATION FOR A WIRETAP NEED NOT BE A SIGNED WRITING

Defendant argues that the original order permitting interception of defendant's wire and oral communication was invalid because it was not properly authorized by the County Attorney. Defendant attributes the invalid authorization to the County Attorney's failure to sign the wiretap application.

Defendant's claim should be dismissed as it is without legal foundation.

Title III of the Omnibus Crime Control and Safe Streets Act of 1968, 18 U.S.C. §§ 2510-2520, provides the framework from which the Utah Interception Communications Act, (hereinafter the Utah Act), Utah Code Ann. § 77-23a-1 (1982), et. seq. was based. The Utah Act, along with it federal counterpart, sets forth the procedure for obtaining judicial approval of the interception of wire communcations which aids in the investigation of specified serious offenses. Specifically, § 77-23a-8, of the Utah Act, governs county attorney applications for interception as follows:

> Any county attorney or any deputy county attorney specially designated by the county attorney, may authorize an application to Utah State district court judge of competent jurisdiction. . .

On its face, this Utah statute does not require the authorization to be in writing or to be signed. Additionally, a scan of federal wiretap cases indicates that personal approval, not written approval, by the county attorney is all that is required to comply with the authorization requirement of Title III.

For instance, in State v. Chavez, 416 U.S. 562 (1974), the Supreme Court upheld the validity of a wiretap issued pursuant to Title III where the statutory procedures of authorization had not been fully satisfied as required by the Title. Specifically, §§ 2518(4)(a) and 2518(4)(d) of Title III were violated because the wiretap order misidentified the officer who had authorized the wiretap orders. Consequently, defendant

sought to suppress evidence that had been obtained under two wiretap orders alleging that a valid authorization for the wiretap orders had not occurred. Despite the procedural violation, the Supreme Court held that since the Attorney General had in fact authorized the application, a valid authorization had occurred and thus, Title III did not mandate suppression. The essence of the Court's holding was that proof of actual authority is all that is required to validate an authorization for an application of a wiretap.[2]

The Ninth Circuit Court of Appeals, in United States v. Scully, 546 F.2d 255 (9th Cir. 1976), cert. denied, 430 U.S. 970 (1976), thereafter considered a claim that a Title III authorization of an application for a wiretap mandated a signed writing. In its decision, the Ninth Circuit explained Chavez and decided the case contrary to the defendant's claim:

> Appellants contend that the application . . . was not properly approved by the Attorney General pursuant to 18 U.S.C. Section 2516(1), as required. In this case, there were documents demonstrating that the Attorney General personally approved of the . . . application, although he did not do so in writing. Under United States v. Chavez, 416 U.S. 562, 94 S. Ct. 1849, 40 L.Ed.2d 380 (1974), personal approval is all that is required to comply with section 2516(1). The statute does not require a written approval.

Scully, 546 F.2d at 261.

In United States v. Thomas, 508 F.2d 1200 (8th Cir. 1975), cert. denied, 421 U.S. 947 (1975), the Eighth Circuit

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[2] Consistent with its holding, the Chavez Court also excluded a wiretape because it had not been in fact authorized by the Attorney Geneal. United States v. Chavez, 416 U.S. at 754-55.

Court of Appeals held that the procedures followed by the Justice Department complied with the wiretap authorization requirements of Title III. In this case, the defendant challenged the authorization for a wiretap because the wiretap application was "signed by a Deputy Assistant Attorney General and not the Attorney General or his specially-designated Assistant Attorney General as required by U.S.C. § 2516. Id. at 1202. In rejecting the defendant's claim, the Court reasoned that since there was independent proof that the Attorney General did in fact approve the application, a valid authorization had occurred.

In United States v. Smith, 726 F.2d 852 (1st Cir. 1984), cert. denied, 469 U.S. 841 (1984), the First Circuit determined the validity of an authorization for a wiretap under Massachusetts law in light of Title III. In this case, the defendants questioned the sufficiency of the authorization for a wiretap because the district authority did not sign the application. The court determined "that the lack of such a document and the presumption it would enjoy is not to the government. The absence of a compelling signature can be remedied by proof of actual authority." Id. at 859.

In the case at bar, sufficient evidence existed to prove that Mr. Hughes actually authorized the intercept order. The original application named Mr. Hughes throughout as the seeking party. (See Br. of App. Addendum pages 11-14.) Inherent in the fact that Mr. Hughes personally filed the application, is

the idea that he must have also authorized it.[3]

The Nunc Pro Tunc Order also establishes that Mr. Hughes actually authorized the application (T. 37). The Nunc Pro Tunc Order not only satisfies evidentiary concerns, but is a judicially accepted method of correcting clerical errors or matters of form so that the record reflects actual orders or judgments rendered by the court. Its purpose is to "supply an omission in the record of something really done but omitted through mistake or inadvertence." Mora v. Martinez, 451 P.2d 992 (N.M. 1969). In sum, the "[n]unc pro tunc procedure is an instrument of truth." Moore v. Mills, 623 S.W.2d 586, 588 (Mo.App. 1981).

However, it is not the function of a Nunc Pro Tunc Order to change or revise a judgment or order, or set aside a judgment actually rendered, or to render an order different from the one actually rendered. Oklahoma Natural Gas Co. v. Corporation Commission of the State of Oklahoma, 715 P.2d 477, 478 (Okla. 1985). The Nunc Pro Tunc procedure is available to correct only clerical orders, not judicial errors, committed in the rendition of judgment.

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[3] Defendant attempts to raise an ancillary issue that the evidence should be suppressed because the original application by Mr. Hughes was not made on "oath of affirmation" to a judge pursuant to Utah Code Ann. § 77-23a-10 (1986). This statute, like § 77-23a-8, and the previously cited case law, does not require the county attorney's signature. Moreover, paragraph 3 of the first application incorporates by reference Sergeant Glen Warner's attached affidavit. (See Br. of App. Addendum page 11.) Sergeant Warner's affidavit follows all the requirement of § 77-23a-10, including the requirement of an "oath and affirmation" to a judge. (See Br. of App. Addendum pages 15-42.). The application is both facially and substantively valid.

Courts have held that the omission of a signature or the signing of the wrong document is a clerical error that can be remedied by a Nunc Pro Tunc Order. For example, in Schmidt v. Schmidt, 617 S.W.2d 601 (Mo.App. 1981), for example, the Missouri Court of Appeals found that the judge's "failure to sign a judgment is a clerical error which can be corrected through a Nunc Pro Tunc entry." Id. at 603. Similarly, in Petroleum Equipment Financial Corp. v. First National Bank, 622 S.W.2d 152 (Tex.App. 1981), the Texas Court of Appeals allowed a Nunc Pro Tunc Order to remedy the judge's signing of an incorrect judgment. In reaching this decision, the court found that the signing of the incorrect judgment was a clerical error because it "involved no judicial reasoning." Id. at 154. See also, Feltmann v. Coutler, 528 P.2d 821 (Ariz. 1974).

In the case at bar, the omission of Don Hughes' signature is precisely the type of situation which a Nunc Pro Tunc Order is designed to remedy: a clerical error. In filing the Nunc Pro Tunc Order, Mr. Hughes did not attempt to alter or modify Judge Wahlquist's original judgment. In fact, the Nunc Pro Tunc Order did not disturb the initial wiretap order, it merely brought the court records into conformity with the truth.

Defendant attempts to discount the Nunc Pro Tunc Order by citing to Utah State Building Board v. Wals Plumbing Co., 16 Utah 2d 249, 399 P.2d 141 (1965), which quotes Kettner v. Snow, 13 Utah 2d 382, 375 P.2d 28, 29 (1962). In Kettner, a plaintiff failed to file within ten days of judgment a motion for a new trial as statutorily required. Sixty days after judgment, the

trial judge allowed the plaintiff's motion for new trial and ordered it effective Nunc Pro Tunc as being within the first ten days of judgment. The Supreme Court of Utah disallowed the Nunc Pro Tunc Order reasoning that if the court could arbitrarily circumvent the 10-day limitation rule, "the rule would be rendered ineffectual." Id. at 30.

Kettner is not analoguous to the case at bar. In the present case, Mr. Hughes did not attempt to remedy inaction through circumvention of statutory procedure. To the contrary, the Nunc Pro Tunc Order attempted to correct a clerical error in an already valid Intercept Order. Because § 77-23a-8 does not require the County Attorney's signature, no violation of express statutory procedure occurred.

Furthermore, courts have traditionally allowed the introduction of independent evidence, such as affidavits, when the question of authorization is at issue. A scan of wiretap cases in state and federal courts indicates that this is a common method to determine who in fact authorized the application. This is allowed so that the "absence of a compelling signature on a critical document can be remedied by proof of actual authority." Smith, 726 F.2d at 859.

For example, the Scully court stated the following:

> Appellant Sanchez contends that the unsworn, unverified file memorandum of the Attorney General does not meet the government's burden of demonstrating approval. Cf. United States v. Chavez, supra. But the affidavit of Sol Lindenbaum, Assistant to the Attorney General, states that the Attorney General approved the application in a telephone conversation with him. This affidavit is sworn to and is sufficient.

Id. at 261. Similarly, the language of United States v. Lawson, 545 F.2d 557, 562 (7th Cir. 1975) is compelling:

> Appellants have raised the question of whether wiretap authorizations signed by an acting Assistant Attorney General, not specifically authorized to approve electronic surveillance under 18 U.S.C. § 2516(1), must be suppressed as facially insufficient under 18 U.S.C. § 2581(10)(a)(ii). See notes 2 and 6 supra.
>
> We are not dealing with a claim that the wiretap application was not authorized by the Attorney General or an Assistant Attorney General because the defendants have not contested government affidavits indicating that Attorney General John Mitchell himself authorized the surveillance. Rather, the attack is on the facial sufficiency of the affidavit because the authorization order was signed by Acting Assistant Attorney General Henry Petersen. . . .

(Emphasis in original.) The court in Lawson refused to suppress wiretap evidence based on the claim of facial sufficiency.

Other examples of this procedure include United States v. Cox, 462 F.2d 1293, 1298-99 (8th Cir. 1972), cert. denied, 417 U.S. 918 (1974); United States v. Schullo, 363 F.Supp. 246, 253 (D.Minn. 1973); United States v. Brick, 502 F.2d 219, 222-23 (8th Cir. 1974); and United States v. Bowdach, 366 F.Supp. 1368 (S.D.Fla. 1973).

United States v. Giordono, 416 U.S. 505 (1974), provides the most dramatic example of the use of affidavits to determine who in fact authorized the wiretap application. In Giordano, the wiretap was facially valid in that the application indicated approval by a specially designated Assistant Attorney General. However, an affidavit submitted by the Executive Assistant to the Attorney General indicated that he, not the

specially designated person, had authorized the application. Going behind the pleadings by use of affidavit, the Court determined that the approval was, in fact, by the wrong person and suppressed the evidence.

In the case at bar, Mr. Hughes filed an affidavit as to the existence and extent of his involvement with the authorization of the application for the wiretap (R. 251-52). Specifically, the affidavit states that Mr. Hughes "personally authorized the initial application for interception on the phone in Hunt's house and caused a pleading to be created so indicating" and that the failure to sign the application was "[d]ue to an oversight" (R. 252).

In light of the foregoing, there is ample evidence that the Mr. Hughes, the Weber County Attorney, personally authorized the initial wiretap on defendant's phone. Since proof of actual authority is all that is needed to validate the authorization, the absence of his signature and was not fatal to the application.

Defendant next contends that the original order was facially invalid as it authorized interception for a longer period of time than is statutorily allowed. Defendant's contention simply misinterprets the language of the order. The first order, dated May 23, 1986 provides that:

> That this Order authorizing the interception of wire (telephonic) communications be executed as soon as practicable commencing on 5/29/86 at 0700 hours and shall proceed until the objective is achieved. Said objective is specifically to include the identification of those persons as yet unidentified and/or known, who

> supply cocaine to David J. Hunt, and their co-conspirators. This Order authorizing the interception of wire (telephonic) upon the initial receipt of incriminating conversations but shall continue until enough evidence is obtained to accomplish the objectives herein states, but in no event shall the authorization to intercept communications extend longer than thirty (30) days past 0700 hours 6/28/86 unless a specific extension is granted by the Court upon a finding of the Court that this is a continuing criminal enterprise and that there is probable cause to believe that the communications sought to be intercepted will continue after the initial period of authorized interception.

(See Br. of App. Addendum pages 45-46.)

The interception was to commence at 7:00 a.m. on May 29, 1986 and to terminate at 7:00 a.m. on June 28, 1986. (See Br. of App. Addendum page 45.) The order was not intended to continue, as defendant asserts, thirty (30) days following June 28, 1986. Thus, Judge Wahlquist granted the wiretap for 30 days; the statutory maximum per § 77-23a-10(5)(a). Therefore, the wiretap order was facially valid and should not be voided.

Similarly, extensions of wiretap orders are available under § 77-23a-10(5)(b) which provides:

> (b) Extensions of an order may be granted, but only upon application for an extension made under Subsection (1), and if the court makes the findings required by Subsection (2). The period of extension may be no longer than the authorizing judge deems necessary to achieve the purposes for which it was granted, but in not event for longer than 30 days.

Judge Wahlquist approved the first extension which allowing the wiretap to continue from June 28, 1986 to July 27, 1986. (See Br. of App. Addendum page 62.) Again, this 30-day extension

period meets statutory limits. Judge Wahlquist authorized the second extension to operate from July 27, 1986 to August 3, 1986. (See Br. of App. Addendum page 79.) The wiretap ceased on August 3, 1986 (T. 32). As extensions are permissible under the Utah Act, and in view of the fact that the wiretap did not operate beyond the prescribed times set by Judge Wahlquist, the extensions are valid.

POINT II

THE DEPUTY COUNTY ATTORNEY WAS DULY AUTHORZED TO APPLY FOR THE WIRETAP EXTENSION.

Defendant contends that the first application for extension of the wiretap was void because it was made by a deputy county attorney not specially designated to authorize such an application. As defendant did not raise this claim in the trial court it is not properly before this court on appeal.

"In the absence of exceptional circumstances, this court has long refused to review matters raised for the first time on appeal where no timely and proper objection was made in the trial court." State v. Loe, 732 P.2d 115, 117 (Utah 1987). See also, State v. Steggell, 660 P.2d 252 (Utah 1983). Specifically on point, the Second Circuit in United States v. Fury, 554 F.2d 522 (2nd Cir. 1977), cert. denied, 433 U.S. 910 (1977), barred a defendant from asserting the claim of impermissible delegation of authority because the defendant "failed to assert it in the pre-trial suppression hearing." Id. at 527 n.4. See also, United States v. Schwartz, 535 F.2d 160, 163 (2d. Cir. 1976), cert. denied, 430 U.S. 906 (1977).

In any event, as discussed in Point I, the issue is not what is written on the pleadings, but whether the deputy was in fact specially designated to approve the applications for wiretap extensions. The affidavit filed by Mr. Hughes clearly sets forth that Mr. Hughes "personally authorized the first application for extension dated June 27th, 1986" and that he "specially designated William F. Daines to review the evidence and pleadings and authorize this application" (R. 252).

Moreover, statutes providing standards for issuance of wiretap orders are to be interpreted "in a practical common sense fashion to effectuate their purpose." People v. Ingram, 684 P.2d 243 (Colo. 1984). The approval of application for wiretap extension dated June 27, 1986 indicates that the deputy was "a duly authorized deputy Weber county attorney." (See Br. of App. Addendum page 51.) In general pleadings, it is unnecessary for a deputy county attorney to use this language. A commonsense reading of the "duly authorized" language indicates that the deputy was authorized to do what he did, to-wit; apply for an extension.

Defendant relies on United States v. Giordano, 416 U.S. 505 (1974), which stands for the proposition that there is a limited class of people that may authorize an application. Accordingly, if the application is not authorized by those specified individuals, the evidence is suppressed. However, the Giordano decision is distinguishable from the case at bar in that in Giordano, the facts showed that neither the attorney general nor a specially designated assistant had in fact approved the

application. Because the facts in this case demonstrate that Mr. Daines was in fact specially designated, a valid authorization occurred.

POINT III

THE EVIDENCE OBTAINED AS A RESULT OF THE SEARCH WARRANT SHOULD NOT BE SUPPRESSED.

Defendant demands that all evidence obtained from the wiretap be suppressed on the basis that the initial wiretap application and first extension not properly authorized.

Utah Code Ann. § 77-23a-7 (1986) provides that the contents of any intercepted wire or oral communication, and any derivative evidence, may not be used at a criminal trial, or in certain other proceedings, "if the disclosure of that information would be violative of this chapter." Under the Utah Act, aggrieved persons may move in a timely manner to suppress the use of such evidence at trial on the grounds that:

> (i) the communication was unlawfully intercepted;
>
> (ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or
>
> (iii) the interception was not made in conformity with the order of authorization or approval.

Utah Code Ann. § 77-23a-10(10(a) (1986).

Defendant demands suppression alleging that "the communication was unlawfully intercepted." Utah Code Ann. § 77-23a-10(10(a)(i) (1986).

Evidentally, defendant adopts the position that every violation of the Utah Act, whether major or minor, should be punished by suppression of the evidence obtained therefrom. However, in analyzing the federal counterpart to the Utah Interception of Communication Act, the Supreme Court opinions in

Giordano and Chavez held that not "every failure to comply fully with any requirement provided in Title III would render the interception of wire or oral communications 'unlawful'". United States v. Chavez, 416 U.S. at 574-75. "To the contrary, suppression is required only for a 'failure to satisfy any of those statutory requirements that directly and substantially implement the congressional intention to limit the use of intercept procedures to those situations clearly calling for the employment of this extraordinary investigation device.'" United States v. Donovan, 429 U.S. 413, 433-34 (1977), quoting United States v. Giordano, 416 U.S. at 527.

The Donovan case concerned 18 U.S.C. § 2518(1)(b)(iv), which requires the government to identify, in its application for a wiretap the person whose communication is to intercepted, and § 2518(8)(d), which requires in part that the issuing judge give notice to the person whose communications were intercepted. Donovan and two others had received proper notice under § 2518(8)(d), but were not named in the application as required by (1)(b)(iv). Two other defendants were inadvertently not listed in the notice documents and thus were not given proper notice. Despite these violations, the Court refused to suppress the evidence for either violation and held that neither provision played a central role in the overall purpose of Title III.

In People v. Wrestler, 458 N.E.2d 1348 (Ill.App. 1984), the Court held that where there has been a technical defect in an eavesdropping order, such a defect did not warrant the drastic remedy of suppression. In that case, the Judge inadvertently

authorized wiretapping for a longer period of time than was statutorily allowed. In rejecting the suppression motion, the Court reasoned that the defect did "not defeat the legislative intent of protecting the citizenry from unnecessary and prolonged intrusion into their privates." Id. at 1352.

Although one could argue that an oral authorization amounts to no authorization at all, notwithstanding, Congress may have envisioned that the writing requirement would play "[n]o role more significant than a reporting function designed to establish on paper that one of the major procedural protections of . . . [Title III] been accomplished." United States v. Chavez, 416 U.S. at 579.

In the case at bar, the omission of Mr. Hughes' signature was a technical error, which error did not defeat a central purpose of the Utah Act. Defendant urges, however, that because of Congress's announced concern over unjustified and excessive wiretapping, the procedural provision should be strictly construed to suppress all evidence even in the face of a minor procedural violation. Granting that Congress is interested in deterring substantive excesses, not inadvertent errors, the evidence should not be suppressed.

It may be argued that written authorization is essential to the central purpose of the Utah Act. Yet, implicit in the caselaw interpreting wiretap legislation is the principle that violations of even central requirements do not mandate suppression if the Government demonstrates to the court's satisfaction that the statutory purpose has been achieved despite the violation.

For example, in United States v. Johnson, 539 F.2d 181 (D.C. Cir. 1976), cert. denied, 429 U.S. 1061 (1977), the court held that the Government's failure to comply with District of Columbia's inventory requirement, D.C. Code Ann. § 23-550, "is not grounds for suppression if the ends of that requirement have otherwise been achieved." Id. at 194. Similarly, in United States v. Chun, 503 F.2d 533, 542 (9th Cir. 1974), the Ninth Circuit has adopted a three-part test focussing on the central purpose of the statutory provision to whether its purpose has been attained.

In United States v. Caggiano, 667 F.2d 1176 (5th Cir. 1982), the Fifth Circuit Court of Appeals held that while "the sealing requirement [of the wiretap tapes] is a central or functional safeguard to prevent abuses of the wiretap act," . . . "the technical noncompliance mandated suppression, however, only if the . . . purpose of the procedure has been frustrated or the procedure has been deliberately ignored." Id. at 1179. See also, United States v. Diana, 605 F.2d 1307 (4th Cir. 1979), cert. denied, 444 U.S. 1102 (1980).

In the case at bar, the central purpose of § 77-23a-8, the statute in question, is to "fix responsibility." United States v. Chavez, 416 U.S. at 216. By identifying the person who authorized the application, responsibility is "centralized in a publically responsible official subject to the political process the formulation of law enforcement policy on the use of electronic surveillance techniques." S. Rep. 1097, 90th Congress, 2nd Session, 96-97 (1968).

Notwithstanding the absence of written authorization, the purpose of affixing public responsibility was met in this case. Responsibility was denoted in the original application which named Mr. Hughes as the public official seeking the application. (See Br. of App. Addendum pages 11-14.) Responsibility was also affixed by the Nunc Pro Tunc Order filed by Mr. Hughes which stated that Mr. Hughes "fully approved the application [for a wiretap] in its final form" (See Br. of App. Addendum pages 49-50.)[4] Finally, responsibility was affixed by the affidavit which clearly identified Mr. Hughes as "personally authorizing the initial application for interception on the phone in Hunt's house and caused a pleading to be created so indicating" (R. 252).

Under these circumstances, both the overreaching purposes of § 77-23a-8(1) ensuring uniformity and political accountability and; (2) the more limited evidentiary function of the writing requirement were clearly satisfied. When there is no suggestion that the Government deliberately ignored § 77-23a-8, and where the statutes purposes have been fully satisfied, the suppression order should not be granted.

Defendant again relies on Giordano which stressed that pre-application approval was essential to the central purpose of Title III. In Giordano, however, neither the Attorney General nor a specifically designated assistant in fact authorized the intercept orders. Thus, in order to comply with Title III, the

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[4] It should be noted that this Nunc Pro Tunc Order was signed by Mr. Hughes and filed before a search warrant was issued on defendant's house and before defendant was arrested.

court reasoned that the Attorney General would have had to authorize an application "after the application is made and after investigative officials have already begun to intercept wire or oral communications under a court order predicated on the assumption that proper authorization to apply for intercept authority had been given." 416 U.S. at n.12. The court's concern in Giordano does not apply to the present case in that the County Attorney did in fact authorize the application for the wiretap from the outset.

POINT IV

DEFENDANT WAS NOT DENIED EFFECTIVE ASSISTANCE OF COUNSEL AS GUARANTEED BY THE UTAH AND THE UNITED STATES CONSTITUTIONS

Defendant argues that defendant was denied effective assistance of counsel at trial because defense counsel failed to properly challenge issues that were critical to the defense.

In order to establish ineffective assistance of counsel "it is the defendant's burden to show: (1) that this counsel rendered a deficient performance in some demonstrable manner, and (2) that the outcome of the trial would probably have been different but for counsel's error." (Footnote omitted.) State v. Geary, 707 P.2d 645, 646 (Utah 1985); see also Strickland v. Washington, 466 U.S. 668 (1984); State v. Lairby, 699 P.2d 1187, 1203-04 (Utah 1984), overruled on other grounds, 739 P.2d 628, 631 (Utah 1987) (adopting Strickland test). Failure to show either deficient performance or resulting prejudice will defeat a claim of ineffective counsel. State v. Geary, 707 P.2d at 646.

The Utah Supreme Court most recently reiterated its adoption of the Strickland test in State v. Archuleta, 747 P.2d 1019 (Utah 1987):

> Before this Court will consider whether specific conduct falls below the required standard of objective reasonableness, the person arguing ineffective assistance must show that the conduct prejudiced his case. [Strickland, 466 U.S.] at 697, 104 S. Ct. at 2069; see also State v. Frame, 723 P.2d 401, 405 (Utah 1986). In order to prove prejudice to his case, "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland, 466 U.S. at 694, 104 S. Ct. at 1028. . . .

Archuleta, 747 P.2d at 1023.

Defendant asserts that his trial counsel was ineffective for the following reasons: (1) he failed to file a timely motion to suppress certain incriminating evidence; (2) he failed to object to the sufficiency of the probable cause statement in support of the search warrant; (3) he failed to object to the sufficiency of the affidavit in support of the intercept order; and, (4) he failed to articulate and support his objection to certain evidence.

As to the first two claims, defendant's claims are inconsistent with the facts. Trial counsel in fact filed a timely motion to suppress the evidence obtained pursuant to the search of defendant's home (T. 39). In the motion to suppress, trial counsel specifically raised the issue whether the probable cause statement was sufficient to support the search warrant (T. 39). Defense counsel also challenged at length the sufficiency of probable cause statement (T. 277-84).

As to the third claim dealing with trial counsel's failure to object to the sufficiency of the intercept order affidavit, the Utah Supreme Court has stated that: "[d]ecisions as to . . . what objections to make . . . are generally left to the professional judgment of counsel." State v. Medina, 738 P.2d 1021, 1023 (Utah 1987). In State v. Malmrose, 649 P.2d 56 (Utah 1982) the Utah Supreme Court said, "[t]his Court will not second guess the strategy of counsel at trial." Malmrose, 649 P.2d at 59.

Regarding the last claim, defendant asserts that if trial counsel's objection to the admittance of evidence was supported by case law, the judge would have suppressed the evidence. Evidentally, defendant believes that but for the lack of supporting authority, the evidence would have been suppressed. Since Utah Code Ann. § 77-23a-8 and applicable case law do not require written authorization, the failures now claimed by defendant were not legal failures. As argued above, defendant is not entitled to suppression of evidence on the grounds now raised on appeal. Thus, trial counsel could not have been ineffective for failing to raise the meritless issues now raised on appeal.

Applying the facts of this case to the test set forth in Strickland and followed in Frame, trial counsel's representation did not fall below the objective standard of reasonableness guaranteed by the Utah and United States Constitutions. Defendant has failed to meet his burden of showing ineffectiveness of counsel and prejudice caused thereby. Therefore, this Court should find that defendant was afforded a

fair trial with constitutionally sufficient representation of counsel.

CONCLUSION

Based on the foregoing arguments, respondent respectfully requests this Court to affirm defendant's conviction.

RESPECTFULLY submitted this 27th day of January, 1989.

R. PAUL VAN DAM
Attorney General

DAN R. LARSEN
Assistant Attorney General

CERTIFICATE OF MAILING

I hereby certify that four true and accurate copies of the foregoing Brief of Respondent were mailed, postage prepaid, to Randine Salerno, attorney for defendant, 2568 Washington Blvd., Suite 205, Ogden, Utah 84401, this 27th day of January, 1989.